

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SALLY FIGUEIREDO, )  
                        )  
Plaintiff(s),       )      No. C 09-4784 BZ  
                        )  
v.                    )      **ORDER GRANTING DEFENDANT'S**  
                        )  
**MOTION TO DISMISS**  
AURORA LOAN, et al., )  
                        )  
Defendant(s).        )  
                        )  
                        )

Before the Court is defendant's motion to dismiss plaintiff's first amended complaint ("complaint") under Federal Rule of Civil Procedure 12(b)(6) and to expunge a lis pendens under California Code of Civil Procedure Section 405.31. The complaint fails to address several threshold issues. Finding no need for oral argument, defendant's motion to dismiss is **GRANTED** with leave to amend **IN PART** and **GRANTED** without leave to amend **IN PART**. Defendant's motion to expunge the lis pendens is **DENIED WITHOUT PREJUDICE**.

The complaint alleges five causes of action: (1) violation of California Civil Code § 2923.5; (2) fraud; (3) intentional misrepresentation; (4) violation of California

1 Civil Code § 2323.6; and (5) violation of California Civil  
2 Code § 1572.<sup>1</sup> Plaintiff originally sought modification of a  
3 mortgage secured by a piece of residential property. Since  
4 plaintiff filed this complaint, the property has been sold at  
5 a trustee's sale.

6 Plaintiff's first cause of action suffers from at least  
7 one basic defect. Section 2923.5 of the Civil Code only  
8 applies to "mortgages or deeds of trust recorded from January  
9 1, 2003, to December 31, 2007, inclusive, that are secured by  
10 owner-occupied residential real property . . . .

11 'owner-occupied' means that the residence is the principal  
12 residence of the borrower as indicated to the lender in loan  
13 documents." Cal. Civ. Code § 2923.5(i) (emphasis added). The  
14 complaint does not allege that the subject piece of property  
15 was ever "owner-occupied." Defendant pointed out this defect  
16 in its motion to dismiss. Motion at 3.

17 Plaintiff, in her opposition, does not counter this  
18 argument and instead asks the court to presume that the  
19 property was owner-occupied simply because she "alleged that  
20 she is protected under" the statute. Opp. at 5. This is too  
21 much of a bootstrap. Plaintiff's failure to allege whether  
22 the property was owner-occupied can be solved by simply  
23 stating so in the complaint. It is plaintiff's obligation to  
24 plead facts sufficient to state a plausible claim for relief.

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26       <sup>1</sup> As filed, plaintiff's first amended complaint omits  
27 pages 11-14. Doc. No. 20. Defendant's motion does not address  
28 any of the causes of action contained in the missing pages,  
including the second and third causes of action. Plaintiff re-  
filed the complete complaint after this motion was fully  
briefed. Doc. No. 35.

1     See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1955 (2009). The  
2 Court will not presume facts that plaintiff failed to allege  
3 in order to defeat a motion to dismiss. If plaintiff cannot  
4 allege that the property was owner-occupied consistent with  
5 her obligations under Rule 11, then plaintiff cannot state a  
6 cause of action under Section 2923.5.

7              Defendant's preemption argument and other challenges to  
8 the first cause of action are best resolved after plaintiff  
9 addresses the Court's concern about owner-occupancy.

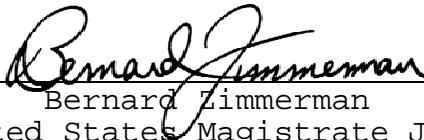
10             Plaintiff's fourth cause of action for violation of  
11 Section 2923.6 of the Civil Code fails because that section  
12 does not provide a private right of action to borrowers. See  
13 Reynoso v. Chase Home Finance, 2009 WL 5069140, \*4-5 (N.D.Cal  
14 2009) and cases collected therein. Plaintiff has not cited,  
15 and this Court has not found, a single case holding that a  
16 borrower has a private right of action under this section.  
17 This cause of action is **DISMISSED WITHOUT LEAVE TO AMEND**.

18             The fifth cause of action under Civil Code Section 1572  
19 presents the same problem as the second and third causes of  
20 action. Plaintiff argues that this cause of action  
21 incorporates paragraphs 32-50 and 63-69 of the complaint.  
22 Paragraphs 32-50 were not included in the operative version of  
23 the complaint.

24             **IT IS ORDERED** that defendant's motion to dismiss is  
25 **GRANTED WITHOUT LEAVE TO AMEND** as to plaintiff's **FOURTH** cause  
26 of action. Defendant's motion is **GRANTED WITH LEAVE TO AMEND**  
27 as to the remaining causes of action. Plaintiff **SHALL** file an  
28 amended complaint by **MARCH 25, 2010**. Defendant's motion to

1 expunge the lis pendens is **DENIED WITHOUT PREJUDICE** to being  
2 renewed if defendant moves to dismiss plaintiff's amended  
3 complaint. The hearing scheduled for **MARCH 17, 2010** is  
4 **VACATED.**

5 Dated: March 15, 2010

6   
7 Bernard Zimmerman  
United States Magistrate Judge

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